No. 2725

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a Corporation, SALMON RIVER CANAL COMPANY, LIMITED, a Corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Trustee, and A. C. ROBINSON, *Appellants*,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, *Appellees.*

Supplemental Petition of Appellants for Rehearing or Modification of Decision.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

S. H. HAYS,

Solicitor for Appellant, Twin Falls-Salmon River Land & Water Co.

Residence: Boise, Idaho.

F. D. Monckton,
Clerk.

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Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit:

Your Petitioner, the Twin Falls-Salmon River

Land & Water Company, one of the appellants in the above entitled cause, respectfully petitions this Honorable Court, as follows:

1. To amplify the decision herein in order to make clearer certain questions which arise from the decision.

2. To grant a rehearing herein upon certain points hereinafter more fully specified.

The questions decided in this case go to the foundations of irrigation development under the Carey Act. The questions are broad ones and many of them have been but slightly touched upon in the briefs or argument. The questions decided are of first importance. Owing to the manner in which the case came up in the Court below, the argument of the case in this Court was directed too much to simply procuring a reversal of the case rather than to a broad discussion of the problems involved and which the case deserved.

Mr. Haga, on behalf of appellants, has filed a petition for rehearing or modification of the decision and has suggested that we file a supplemental petition.

Upon reading the opinion of this Court, counsel on both sides are confronted with the problem—What is the lower court to do with the case? What questions remain for decision and what course shall be pursued?

In order to aid this Court in understanding our problems, we will state what we believe the Court

has decided and what we believe the effect of the decision is so that the Court may correct us if our views are inaccurate.

It is our view that the Court has decided:

Nature of Grant.

1st. That the grant to the State was not a grant in praesenti, but, on the contrary, "such States were made the agency through which the lands might be reclaimed and the terms and conditions were therein prescribed by Congress, on the performance of which, the title of the United States thereto should pass by patent of the government." We understand the Court to hold that the grant is one conditioned upon the building of the irrigation works and the furnishing of an ample supply of water for the reclamation of the land. We do not differ upon this point with the Court in substance. We do say, however, that the question as to water supply was decided by the Secretary of the Interior at the time when he segregated the land and that this is a reasonable construction to give to the statute for the reason that the water supply is not a thing that can thereafter be affected and changed by human effort. It was a thing that the Secretary ought to have decided in advance and which he did decide in advance, and we contend that this decision so made is final. The difference between ourselves and the Court is merely as to the *time* when the Secretary's final de-

cision is made as to the sufficiency of the water supply.

We also say that the lien which the Act of Congress authorizes was a lien to be fixed in advance of the construction of the works; that this lien was actually fixed upon the acreage of land which the ditches were built to cover and that this lien ought not to be defeated by a change of the Secretary's decision as to the sufficiency of the water supply and that the statute did not contemplate that it should be. This will be more fully considered hereafter.

All parties had notice of the law and the effect of State supervision.

2nd. We understand the Court to say:

> "That the laws of the State applicable to the appropriation and use of the non-navigable waters of the State are controlling is of course clear, *and that all parties contracting with respect to such waters and desert lands do so with at least the presumed knowledge of both the Federal and State laws* is also plain." (p. .)

The Court also says: (p. .)

> "The construction company, the settlers and the parties who furnish the money for the building of the system receiving as security therefor the liens authorized both by Congress and the State *are therefore each and all charged with full knowledge of the laws and provisions of the contracts.*"

We understand the Court to mean that the con-

struction company, the settlers and the bondholders all went into this enterprise with knowledge and notice of the provisions of the law; with knowledge and notice that the project might not prove successful, and, if not successful, that all parties, including the construction company, the bondholders and the settlers, might suffer loss. That the settlers might never get patent to their land and the construction company might not obtain a lien thereon. We understand the Court in this way gives due effect to the provisions of the law providing for State supervision.

The statute of the State (Sec. 1615 R. C.) did not require the promoters of the project to make any representations whatever in regard to the water supply; this was so for the reason that it was intended that the officers of the State should examine into and decide the question as to the sufficiency of the water supply and that after they had decided this question, it was to be presented to the Secretary of the Interior for decision; that the question of water supply did not rest upon any guaranty by promoters or upon any representations by promoters; that it rested wholly upon the examination and decision of the State and National authorities; that the works to be built for utilizing the water supply were likewise works decided upon and approved by the State and National authorities; that the whole purpose of the law was to provide for State supervision

and do away with any necessity for representations by promoters; that for this reason and on account of the notice all parties had of this and the other laws affecting the project, no right of action arises in this case out of a mistake of the State or National authorities in regard to the sufficiency of the water supply.

Settlers' Water Right.

3rd. We understand the Court to hold that water is to be distributed to the settlers at the rate of .01 of a cubic foot of water per second of time for each acre of land under rules and regulations which, by the terms of the contract, are to be provided by the company and that such head of water or such supply of water is to be delivered to the settler at such times and in such quantities as the condition of the weather and the crops may determine, and that the water is to be delivered under a rotation system instead of a continuous flow; that this supply of water is to be delivered to each settler in proportion to his needs and without discrimination; that is to say, that each settler, having a valid entry upon the project and holding a contract under which he is entitled to water, shall be entitled to a delivery of water such as is mentioned above to the extent of the available supply.

A very important question arises here. There are fifty-seven thousand acres of valid entries upon the project. Of this area the owners of forty thousand acres approximately have cultivated a large

portion of the total area of their entries. The remaining acreage is in different states and conditions. Some of it has been cultivated and final proof made to the State (under Sec. 1628 R. C.), and thereafter, little if any cultivation has taken place upon it, the owner simply awaiting the conclusion of the litigation. Other areas are in various states of development. The owners of the fifty-seven thousand acres hold contracts, however, entitling them to water.

We understand the Court to hold that there is no priority among these settlers. It is so expressly provided in the contract which the Court quotes and in addition to this, the statute of the State provides (Sec. 1615 R. C.) that the proposal made to the State Land Board shall state the source of water supply, the location and dimensions of the proposed works and estimated cost thereof and

> "the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights *to embrace a proportionate interest in the canal or other irrigation works together with all the rights and franchises attached thereto.*"

In the beginning, a water right is taken out by the company proposing to build the works in bulk for the entire acreage to be reclaimed. Since the water right is taken out in bulk for the benefit of the entire area, the statute very naturally provided that those who took their rights under this appropriation

should be on an equality and that their rights should be *proportionate.* The statute above quoted fixes this. It is this statute and not the contract which determines the matter. The contract merely follows the statute as it must and states in terms that the interest which the settler acquires is only the proportionate interest defined by the statute (Par. 6, State Contract, pp. 373-4, record). The provision of the statute giving to each settler a proportionate part of the water supply is obviously entirely reasonable and intended to do equity among the settlers, but from this very equality of right and the fact that there is no priority among the settlers, there arise important conditions. All of the settlers upon the project have an equal right to the water supply and are entitled to have delivered to them a head of water amounting to .01 of a cubic foot of water per second of time for each acre of land under a rotation system and under suitable rules and regulations, such water supply to be delivered to each of them in proportion to their needs until the entire supply is exhausted. The canals have been properly built to deliver an adequate supply of water. The reservoir likewise has been properly built. For some years past, the water supply has been scanty. During the present year, we find the largest water supply the project has ever had, the sufficiency of which would probably be admitted. It seems to us that under the opinion of the Court we are bound to treat every settler upon the tract in proportion to his

needs exactly as every other settler is treated and deliver water proportionately. The appellants contended that there was no specific water right given to the settlers in the sense only that there was no right to 2¾ acre feet of water per acre. The appellants did, however, contend that the settlers had a proportionate right and that this arose from the statute and also from the terms of the contract; also that this right was a right to have a head of water of .01 of a cubic foot of water per second of time delivered under the terms of the contract, as the Court has stated in the opinion. It appears that the word "specific," in referring to the water right, has been understood in different ways and perhaps has been used in different ways and this may give rise to some misapprehension. Some people have contended that the water right which the Court has stated in the opinion the settler is entitled to is not a specific water right but only a proportionate interest in the supply. This amounts, however, merely to a criticism of the use of the word "specific." A water right, as defined by the Court, is in substance what appellant contended for with the understanding that the company is bound to deliver water to the extent of the available supply and no more; that is to say, that there is no liability for the inability to deliver a greater supply than nature has provided.

The sufficiency of the water supply was determined by the State and National authorities before

the building of the works. The statute did not prescribe that any representations whatever (Sec. 1615 R. C.) as to the sufficiency of the water supply should be made by the persons proposing to build the works. The question of water supply was to be determined solely by the State Engineer (Secs. 1619-20 R. C.). Later on, to be approved by the Land Board and then by the Secretary of the Interior. If both the State and National authorities erred in regard to the sufficiency of the supply, this is not the fault of the persons constructing the works, although they also thought the supply was sufficient. It was not intended, and the statute did not provide, that the matter of water supply should rest upon the representations or guarantees of the promoters of the project. The decision as to the water supply rested entirely with the State and National authorities. A water supply of .01 of a cubic foot of water per second of time to be delivered under the rotation system as the needs of the crops require was a provision relating to the method of distribution of the water supply which had been previously determined by the State and National authorities to exist. The State Contract and the contracts with the settlers were all entered into shortly after the approval by the State and National authorities of the sufficiency of the water supply and of the works to be built and these contracts were entered into in view of such approval. The matter being a matter determined by the State before the making of the contract, and not

a matter depending upon representations, there is no liability on account of the failure to deliver a greater water supply than nature has provided, and for this reason, among others, the action could not be maintained.

Authority of Secretary of the Interior.

4th. We understand the Court to hold that the area which can be irrigated and for which patent to the State is to be issued, is purely a question of fact and that the decision of the Secretary upon this point is final in the absence of fraud. That it is not a question for the Court in any respect, and, if this is true, then there is nothing for the lower court to determine with regard to the area to be irrigated, and in effect there is nothing left for the lower court to do except to dismiss the case, barring the one point of entering an injunction against future sales, over which there is no controversy as it is not desired to make more sales. We understand the Court to hold that it will be incumbent upon the Secretary to determine what area he will permit to be patented; that, in effect, the Act of Congress was a grant upon a condition subsequent depending entirely upon the final success of the project. The Court, in referring to the matter of the water supply and the area to be patented says in the opinion:

> "It is obvious that whether or not such a supply is actually furnished is a pure question of fact and that all questions of fact in relation

> to all of the public lands are matters for the exclusive determination of the officers of the Land Department has been so many times decided by the Supreme and other Federal Courts as to render the citation of cases unnecessary."

We agree to the principle of law to the effect that all questions of fact in relation to all of the public lands insofar as they are administrative in nature are matters for the exclusive determination of the officers of the Land Department. The provision of the Carey Act, however, is unusual. The statute provides that the plan shall be presented to the Secretary for his approval. Upon his approval, the land is segregated and at the time of the segregation the Secretary of the Interior enters into a *written contract* with the State by which it is agreed that the lands shall be patented to the State. In this contract the Secretary may embody the terms of the law. He cannot add qualifications. The contract follows the terms of the law only. The matter, when the segregation is made, rests upon *contract*. The Government has contracted to convey the lands to the State upon certain conditions, the fulfillment of which will entitle the State to a patent. Under these conditions, we say that the Secretary has not the authority to finally decide as to whether this contract has been complied with. He stands in the same position as any other party to a contract. Since this matter rests on *contract*, we have the right to resort to the courts to enforce it and to have the matter de-

termined in court. There is no decision of the Federal Courts that we are able to find which, under such circumstances, gives to the Secretary the exclusive power to determine whether a contract has been complied with or not. In this respect the Carey Act is peculiar and the rule of law mentioned by the Court does not apply. If this view of the law is correct, then there may be a question for the lower court to determine in regard to the area of land which is to be patented and which is to be irrigated by the available water supply. The Secretary of the Interior administers the land laws, and under these laws questions of fact as to whether persons are entitled to land or not are settled by the Department. All matters involving land "entries" which do not involve contracts are decided and settled by the Secretary. Contracts for construction made with the Government, where many questions arising under the contract are to be decided by engineers or architects, are, of course, common and the contracts made provide for decisions to be so made, but there is no provision of that kind here. There is no provision that the Secretary shall decide the matter and he has no such power under any statute in a matter arising under a *contract*, therefore the rule mentioned by the Court does not apply.

Nature of Project—Plan of Development.

5th. In speaking of the project, the Court at one place in the opinion says that the compensation of

the construction company for the liability assumed

> "must of necessity come from the sale of the lands and of rights to the appropriated water."

The expression "sale of the lands" is evidently here used in what might be called a colloquial sense rather than a strictly legal sense. It appears to us that in some respects the opinion treats the transaction between the parties as a *sale*. This should be understood, however, only in a very limited sense. The Construction Company makes its proposal to the State for the building of the works. At the same time it makes a water appropriation. A nominal fee is charged by the State for this appropriation. (Sec. 3753 R. C.). This water supply under the statute and under the contract becomes appurtenant to the land to be irrigated. This method is adopted simply as convenient machinery for the purpose of annexing the water right to the land. The land is granted to the State. The State sells the land to the settler and obtains fifty cents an acre therefor, which is the entire sum which the settler pays for the land. The water belongs to the State but it provides by law, as above stated, the machinery whereby, in cases of this kind, the water is to be attached to the land. It is erroneous to say that the company receives anything whatever from the "sale of the land." The company builds the works and sells shares in the works with the attached water right to the settlers. The settlers receive under the statute (Sec. 1615 R. C.),

> "a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto."

The rights and franchises attached thereto have been held by the State Court in construing this statute to mean the water rights belonging to the project.

> State ex rel. West vs. Twin Falls Canal Co. 21 Ida. 410 (423).

This decision construing this State statute ought to be followed by this Court. The Construction Company is paid for the investment it makes by a lien upon the land which is to be benefited, but this lien is a limited one. It is limited,

> "to the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

The amount paid for a water filing no doubt might be included in the lien given the company under the head of "necessary expenses of reclamation." But that is a very small item. The thing which the company is paid for doing and for which it is entitled to a lien is for the building of the works. As cited in the original and supplementary briefs, the Land Board of this State has always considered the company in the attitude of a "construction company" whose only business it was to build

the works in accordance with the terms of the contract.

Rules and Regulations of Land Board June 10, 1905; Oct. 16, 1909.

State ex rel. West vs. Twin Falls Land Co. 21 Ida. 410 (bottom p. 424).

The law in regard to the fixing of a lien followed in substance the irrigation district law which at the time of the enactment of the Carey Act had become quite popular in many western States. The irrigation district law provides for a settlement in advance, of the character and nature of the works to be built and an estimate of their cost and the fixing of a lien upon the land for the benefit conferred. Such was the procedure here. The State was authorized before the building of the works to fix a lien upon the land.

The State owned the water. The land was to be granted to the State by the Government. The Construction Company made an application for a water permit merely as a method of attaching the water which belonged to the State to the land which was to be granted to the State. It did not receive compensation for the water to be delivered to the settlers except only in the small incidental way that it may have been repaid for the cost of making the water filing. The lien was granted to the company and it was paid for the *building of the works.* The company was not required by the statute to make any

representations as to water supply. That was a matter which the State determined through its proper officers and which the Secretary of the Interior later on determined. As a means of equitably distributing the water supply among the settlers, the statute provided that the shares in the system should represent a proportionate interest in the water supply and that this should be a perpetual as opposed to a rental right. At the time of the making of the contract, the State and National authorities had fully determined that the water supply was sufficient, and for this reason, there remained nothing to do except to describe the method whereby this water supply should be delivered to the settler in order that the rights of the settlers as among themselves should be equitably adjusted. In doing this the contract first provided for a certain ditch capacity and it next provided that the settler should be entitled to receive water at the rate of .01 of a cubic foot of water per second of time; in other words, this was the "head of water" which he was entitled to receive. In the interest of economy of water supply and the benefit of the entire system, it was provided that the rotation system should be used and that water should only be applied when the condition of the weather and the crops made it necessary. The whole subject of water supply, so far as the water contracts are concerned, was, however, approached from the standpoint of a supply that had been predetermined to be sufficient. While we speak of the

proportionate interest in the irrigation works and the appurtenant water supply as a "sale of a water right," still, we should also take into consideration the particular sense in which this colloquial phrase is used in connection with the Carey Act.

Lien Under the Carey Act—Construction of the Statute.

6. The amendment to the Carey Act of June 11th, 1896, provided as follows:

> "A lien or liens is hereby authorized to be created to the State to which such lands are granted and by no other authority whatever and *when created*, shall be valid on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

The whole plan was one for construction of works. The statute of the State providing that any person or corporation might make a proposal for the construction of the works amounted to an advertisement for bids. The proposal filed with the Land Board amounted to a bid. The examination of the plans for the works and the determination of the water supply by the State Engineer was very similar to the acts of the architect on behalf of the owner of a property in passing on the sufficiency of the construction plans. The plans having been approved by the State and National authorities, the contract

for construction is made. Now, in all construction work, it is necessary to determine, first, the thing to be built; and, next, the cost thereof; and so here, it was necessary to determine what canals or other works were to be built, what area of land was to be covered, and in order to provide for the payment of the money for the building of the works it was necessary to determine in advance the lien to be fixed upon the land which was to be benefited by the construction. The entire plan contemplated and the State statute specifically provided for the fixing of a lien at the time of the making of the State Contract in advance of the construction of the works. The sufficiency of the water supply had then been decided on and there remained then nothing to do except to construct the works.

The act of June 11th, 1896, provided that the lien should be valid "when created" against the land to be improved. The State authorities fixed the lien; they decided the acreage to be irrigated; they provided for the opening of the land for settlement. The construction company was required to sell shares in the system with the appurtenant water right to all persons settling upon these lands upon demand and upon compliance with the terms of the contract. The Secretary segregates the lands in order that a lien may be fixed upon it and and this lien is valid at the time of its creation. If the Secretary may thereafter change the area to be irrigated, he would in effect be permitted to revoke the lien which had

been created. The settler settles upon the land when the State throws it open for settlement. If the Secretary may change the area of the project, he may prevent the settler from obtaining title to his land. In answer to this it may be said that it is provided that the lien shall be valid "on and against the separate legal subdivisions of land *reclaimed.*"

In this connection, consideration must be given to the circumstances under which the State contract creating the lien is entered into. It is not entered into until the State authorities have found the water supply sufficient and the Secretary of the Interior has likewise approved it, otherwise the segregation is not permitted; in other words, the Secretary must pass on the sufficiency of the water supply at the time of the segregation and no segregation can be made unless this supply is sufficient. No human effort can change the water supply. It is reasonable that the Secretary should finally pass upon it at this time. The water supply being found sufficient, there is nothing then remaining to be done except to build the necessary works to conduct the water to the land. This is the way in which the land is "reclaimed."

The original act of August, 1894, provided that the land must be

> "*irrigated, reclaimed, occupied* and not less than twenty acres of each one hundred sixty acre tract *cultivated* by actual settlers."

But the amendment of June, 1896, did away with all this and provided that

> "When an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract or tracts of such lands, then the patent shall issue for the same to such State *without regard to settlement or cultivation.*"

We say that considering the fact that the area to be irrigated must of necessity be predetermined and the works built, and considering also that the lien must be fixed in advance upon this area and that the settlers must settle upon the land long prior to the time when patent is issued, that the "ample supply of water" mentioned in the statute merely refers to the supply which the Secretary has already passed upon in segregating the land and that patent for the land should not be defeated by a series of dry years or by the change of mind on the part of the Secretary. The Secretary undoubtedly has the right to pass upon the sufficiency of the water supply. We believe from the nature of the work and the conditions surrounding these projects that he passes upon it finally at the time of making the segregation. The Court seems to have held otherwise on this point, and upon this point we request a rehearing or modification of the opinion.

In conclusion, we urge that a rehearing be granted upon the question of the construction of the statute.

That there be some amplification of the opinion as to the other matters herein indicated.

Respectfully submitted,

SAMUEL H. HAYS,

Solicitor for Petitioner, Twin Falls Land & Water Co.

I, Samuel H. Hays, Counsel for Petitioner above named, do hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated June 11th, 1917.

SAMUEL H. HAYS,

Solicitor for Petitioner.